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No. 09-328

In the Supreme Court of the United States

SNELL ISLAND SNF, LLC D/B/A SHORE ACRES REHABILITATION AND NURSING CENTER, LLC, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED

Whether Section 3(b) of the National Labor Relations Act, 29 U.S.C. 153(b), authorizes the National Labor Relations Board to act when only two of its five positions are filled, if the Board has previously delegated its full powers to a three-member group of the Board that includes the two remaining members.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 568 F.3d 410. The decision and order of the National Labor Relations Board (Pet. App. 34a-44a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 2009. The petition for a writ of certiorari was filed on September 11, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In enacting the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, Congress sought through

"the promotion of industrial peace to remove obstructions to the free flow of commerce as defined in the Act." *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 257 (1939); see 29 U.S.C. 151. To that end, the NLRA provides mechanisms to resolve questions concerning union representation peacefully and expeditiously, see 29 U.S.C. 159, and to remedy and prevent unfair labor practices, see 29 U.S.C. 158, 160.

Congress "confide[d] primary interpretation and application of [the NLRA] to a specific and specially constituted tribunal," the National Labor Relations Board (NLRB or Board). *Garner* v. *Teamsters, Local Union No. 776*, 346 U.S. 485, 490 (1953); 29 U.S.C. 153, 154, 159, 160. As originally constituted, the Board comprised three members, and the vacancy and quorum provisions of the Act provided: "A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum." National Labor Relations Act, ch. 372, § 3(b), 49 Stat. 451.[1]

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[1] Pursuant to that two-member quorum provision, the original Board, from 1935 to 1947, issued 464 published decisions with only two of its three seats filled. The Board had only two members during three separate periods during that time: September 1 until September 22, 1936; August 27 until November 25, 1940; and August 28 until October 10, 1941. See *Second Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1937*, at 7 (1937); *Sixth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1941*, at 7 n.1 (1942); *Seventh Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1942*, at 8 n.1 (1943). Those two-member Boards issued three published decisions in 1936 (reported at 2 N.L.R.B. 198-240); 237 published decisions in 1940 (reported at 27 N.L.R.B. 1-1395 and 28 N.L.R.B. 1-115); and 225 published decisions in 1941 (reported at 35 N.L.R.B. 24-1360 and 36 N.L.R.B. 1-45).

In 1947, Congress enacted the Taft-Hartley Act, which enlarged the Board's unfair labor practice jurisdiction and amended Section 3(a) of the NLRA, 29 U.S.C. 153(a), to increase the Board's size from three to five members. See Labor-Management Relations Act, 1947, ch. 120, § 101, 61 Stat. 139. Congress also amended Section 3(b) to authorize the Board "to delegate to any group of three or more members any or all of the powers which it may itself exercise," and amended the quorum requirements to provide that "three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof [respecting delegation]." *Ibid.* Since 1947, the overwhelming majority of the Board's decisions have been issued by three-member groups constituted pursuant to the Board's Section 3(b) delegation authority.[2]

2. In 2002, the Board solicited an opinion from the Department of Justice's Office of Legal Counsel (OLC) on the question whether the Board could continue to operate with only two members if the Board had previously delegated all of its powers to a group of three members. OLC, U.S. Dep't of Justice, *Quorum Requirements*, 2003 WL 24166831 (Mar. 4, 2003). Prior to that request, the Board had not issued decisions when it had

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[2] See *Thirteenth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1948*, at 7, 9 (1949); Staff of J. Comm. on Labor-Management Relations, 80th Cong., 2d Sess., *Labor-Management Relations* 6 (Comm. Print 1948); *1988 Oversight Hearing on the National Labor Relations Board: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 100th Cong., 2d Sess. 44-46 (1988) (*Deciding Cases at the NLRB*, an attachment to the prepared statement of the NLRB Chairman).

only two members since Congress expanded the size of the Board to five members in 1947. *Id.* at *1. The OLC opinion concluded that, under Section 3(b), if the Board, at a time when it had at least three members, had "delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained." *Ibid.*

In late 2007, the Board had four members but anticipated losing two of those members imminently when their recess appointments expired at the end of the year. Effective December 28, 2007, the four sitting members of the Board—Members Liebman, Schaumber, Kirsanow, and Walsh—delegated all of the Board's powers to a three-member group consisting of Members Liebman, Schaumber and Kirsanow.[3] *Laurel Baye Healthcare of Lake Lanier, Inc.* v. *NLRB*, 564 F.3d 469, 471 (D.C. Cir. 2009), petition for cert. pending, No. 09-377 (filed Sept. 29, 2009). After the recess appointments of Members Kirsanow and Walsh expired three days later, remaining Members Liebman and Schaumber, acting as a two-member quorum, continued to exercise the powers the

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[3] Also effective that day, the Board temporarily delegated to the General Counsel under Section 3(d) of the NLRA, 29 U.S.C. 153(d), full and final authority on behalf of the Board to initiate contempt proceedings for non-compliance with Board orders, to institute and conduct appeals to the Supreme Court, and to initiate and prosecute injunction proceedings, under Sections 10(e), (f), and (j) of the NLRA, 29 U.S.C. 160(e), (f), and (j). See Minute of Board Action (Dec. 20, 2007); NLRB, *Press Release No. R-2653, Labor Board Temporarily Delegates Litigation Authority to General Counsel; Will Issue Decisions with Two Members After Members Kirsanow and Walsh Depart* (Dec. 28, 2007) <http://www.nlrb.gov/shared_files/Press%20Releases/2007/R-2653.pdf>.

Board had delegated to the three-member group.[4] *Ibid.* Since January 1, 2008, that group, through its two-member quorum, has issued over 400 decisions.[5]

3. Petitioners operate Shore Acres, a nursing home providing long-term health care and related services to elderly and disabled adults in St. Petersburg, Florida. Pet. App. 6a, 36a-37a. On December 12, 2007, employees at Shore Acres participated in a representation election and elected United Food and Commercial Workers Union, Local 1625 (Union) as their exclusive collective bargaining representative. *Id.* at 6a. Petitioners filed 13 objections to the election; a regional director of the NLRB reviewed the objections and recommended that they be overruled in their entirety. *Id.* at 6a-7a.

On March 13, 2008, the Board—made up of the two sitting members acting as a quorum of the three-member group to which the Board had delegated its full powers—adopted the Regional Director's recommendation and certified the Union as the employees' exclusive-bargaining representative. Pet. App. 7a, 45a-47a. Petitioners subsequently refused to recognize and bargain with the Union. *Id.* at 7a-8a. The Union filed an unfair labor practice charge on May 16, 2008, and on May 28,

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[4] On July 9, 2009, the Senate received the President's nomination of Craig Becker, Mark Gaston Pearce, and Brian Hayes to be members of the National Labor Relations Board. 155 Cong. Rec. S7332 (daily ed. July 9, 2009).

[5] On May 4, 2009, it was reported that the two-member quorum of the group had issued approximately 400 decisions, published and unpublished. See Susan J. McGolrick, *Two Circuits Divide on Authority of Two-Member Board to Issue Rulings*, Daily Labor Rep. (BNA) No. 83, at AA-1. The published decisions and summary judgment rulings are reported and listed in 352 N.L.R.B. (146 decisions), 353 N.L.R.B. (132 decisions), and 354 N.L.R.B. (104 decisions as of November 12, 2009).

2008, the Board's General Counsel issued a complaint alleging that petitioners' refusal violated Section 8(a)(1) and (5) of the NLRA, 29 U.S.C. 158(a)(1) and (5). Pet. App. 8a, 34a.

On July 18, 2008, the two-member Board issued its decision and order agreeing with the General Counsel that petitioners' refusal to bargain with the Union violated Section 8(a)(1) and (5) of the NLRA, 29 U.S.C. 158(a)(1) and (5). Pet. App. 34a-44a. The Board ordered petitioners to recognize and bargain with the Union. *Id.* at 41a.

4. Petitioners filed a petition for review of the Board's order in the United States Court of Appeals for the Second Circuit. Pet. App. 8a. The Board cross-applied for enforcement of its order, and the court of appeals consolidated the cases. *Id.* at 8a-9a. Petitioners challenged the authority of the two-member quorum of the delegee group to issue the decision and order, and disputed the Board's finding that petitioners had engaged in unfair labor practices. *Id.* at 8a-10a, 31a. The court of appeals granted the Board's cross-application for enforcement and denied petitioners' petition for review. *Id.* at 33a.

On the question of the Board's authority to operate with its two remaining members, the court of appeals first stated that it would review the Board's continuing authority under the two-step process set out in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). Pet. App. 10a-11a. Under that analysis, the court first inquired whether "Congress has directly spoken to the precise question at issue." *Id.* at 11a (quoting *New York ex rel. N.Y. State Office of Children & Family Servs.* v. *United States Dep't of Health & Human Servs.' Admin. for Children & Families*, 556 F.3d 90, 97 (2d Cir. 2009)).

The court looked first to the decisions of the three other courts of appeals that had considered the authority of the two sitting Board members to issue decisions, and noted that no two circuits had agreed in both their reasoning and result. *Id.* at 13a-19a.

Proceeding to its own analysis, the court of appeals upheld the Board's initial delegation of authority to the three-member group, rejecting petitioners' argument that the delegation was an unlawful "sham" because the Board knew that the group would soon be reduced to two members. Pet. App. 19a-21a. The court found "more difficult" the question whether that panel had "lost its authority once the NLRB as a whole lost its quorum," noting that the circuit split suggested an ambiguity in the statute. *Id.* at 21a. In the court's view, "nothing in the statute itself explains what happens to a duly constituted *panel* of the [Board] when the *Board* itself loses its quorum." *Ibid.* Nor, the court concluded, did either canons of statutory construction or the legislative history of the 1947 amendments to the NLRA shed sufficient light on Congress's intent to resolve the question. *Id.* at 22a, 26a-29a.

Concluding that the statute is ambiguous as to the continuing authority of the remaining two members of the delegee group, the court of appeals proceeded to the second step of the *Chevron* analysis, which counsels courts to defer to an agency's reasonable interpretation of a statute it administers. Pet. App. 29a-30a. The court emphasized that, while the Act "does not expressly provide that a panel retains jurisdiction where the Board loses its quorum, neither does the Act state that the panel loses jurisdiction in such circumstances." *Ibid.* The court found reasonable the Board's position that a two-member quorum of a three-member group to which

the Board validly delegated its powers may continue to exercise those powers. The court therefore held that the "panel in this case was a lawfully convened panel of three members" and that, because the panel retained a two-member quorum, it "continued to operate in accordance with section 3(b) of the Act after one of its members ceased to serve on the Board and even though the Board itself lost a quorum." *Id.* at 30a.

The court of appeals went on to reject petitioners' challenge to the Board's unfair labor practice findings. Pet. App. 31a-33a.

ARGUMENT

Petitioner asks this Court to decide whether Section 3(b) of the NLRA authorizes the NLRB to act when only two of its five positions are filled, if the Board previously delegated its full powers to a three-member group of the Board that included the two remaining members. On November 2, 2009, this Court granted the petition for a writ of certiorari presenting the same question in *New Process Steel, L.P.* v. *NLRB*, No. 08-1457 (*New Process*). The Court therefore should hold the petition in this case pending its resolution of *New Process* and then dispose of the petition accordingly.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *New Process Steel, L.P.* v. *NLRB*, cert. granted, No. 08-1457 (Nov. 2, 2009), and then should be disposed of accordingly.

Respectfully submitted.

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